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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 518

ROBERT STEPPS ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT
and
APPENDIX

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IN THE

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OCTOBER TERM, 1967

No. _____

ROBERT STEPPS ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

The petitioner prays that a writ of certiorari issue to review the judgment of the Arkansas Supreme Court affirming his conviction of voluntary manslaughter.

CITATION TO THE OPINION BELOW

The opinion of the Arkansas Supreme Court has been reproduced as Appendix A, *infra*, p. 16, and is reported at 242 Ark. 587.

JURISDICTION

The opinion of the Arkansas Supreme Court was delivered on May 15, 1967. A petition for rehearing was

timely filed, but was denied on May 22, 1967 by a per curiam order.[1] A motion for stay of mandate pending this application for writ of certiorari was then presented to the Arkansas Supreme Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Was petitioner deprived of due process of law where he was arrested without a warrant, jailed without bail, never taken before a magistrate and not arraigned until the morning of the trial?

2. Where petitioner, a member of a minority group, filed a motion to quash the petit jury panel for limitation and exclusion of members of the Negro race, and the proof was not disputed, did the trial court err by overruling the motion?

3. Whether the failure of investigating officers to safeguard and produce the knife of the deceased found at the scene constituted improper and illegal suppression of evidence?

CONSTITUTIONAL PROVISION INVOLVED

This case presents issues involving the Fourteenth Amendment to the Constitution of the United States.

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[1] Reported on unnumber page of Arkansas Supreme Court Advance Reports, Vol. 242, No. 14.

STATEMENT

The petitioner, Robert Lee Stepps, is an adult Negro male. He was charged in the Jefferson County Circuit Court with first degree murder for allegedly taking the life of Artis Frazer. On the day scheduled for trial, the prosecuting attorney was permitted to reduce the charge to murder in the second degree. The jury returned a verdict finding petitioner guilty of voluntary manslaughter and assessed his punishment as three years in the State Penitentiary.

Although the guilt or innocence of the petitioner is not an issue here, certain aspects of the trial relate directly to the reasons urged for granting the writ. Thus, a brief review of the circumstances which brought petitioner to trial is deemed essential.

The testimony revealed that on January 15, 1966, the petitioner and a friend went to a popular place named Miller's Drive-In. After the petitioner had remained there for a while, Artis Frazer confronted him, jerked or snatched a beer can from the petitioner's hand and cursed the petitioner. Apparently, Frazer did not pursue the incident further until later when he approached the petitioner with a knife. The petitioner warned the deceased not to come closer. The deceased paused for a moment, but then ignored the repeated cautioning of petitioner and advanced further. As the deceased reached dangerously near, the petitioner fired one shot which struck the deceased in the head. The petitioner then left the premises and notified the Sheriff's Office of the incident. It should be noted parenthetically, that there had been another altercation involving the deceased with both the petitioner and his wife the previous month.

After the petitioner had surrendered to the peace officers, he was confined in a jail for three days without bail before the prosecuting attorney filed a felony information charging petitioner with first degree murder. The bench warrant was not returned or filed until January 20, some five days after the date of petitioners' arrest. During the interim, petitioner was not taken before a magistrate or given any sort of a hearing.

The petitioner, through his employed trial counsel, timely filed a motion to quash the petit jury panel and prior to the commencement of the trial, testimony was solicited in support of this motion. Although that proof might be described as limited, the allegations and factual data contained in the motion were not denied nor contradicted by the prosecution in any manner whatsoever. The arraignment of petitioner did not take place until the morning of the trial after objection was made by his trial attorney.

During the course of the trial, the petitioner called one of the investigating officers as a witness to support his contention of self defense. This witness testified that he picked up a weapon at the scene which he described as a "crab apple switch" blade knife. When defense counsel asked the witness where the knife was, the witness answered that he could not find it. Another police officer who shared the locker with the witness, testified that he did not remember seeing the knife at the scene nor did he ever see the knife in the locker. Thus, this extremely important and material instrument, which was essential to the proper defense of the case, was not available for display to the witnesses or the jury.

On appeal, the Supreme Court of Arkansas chose to ignore all but five of the forty-five assignments sched-

uled by petitioner as causes for a new trial. In its rather brief opinion, the Arkansas Supreme Court concluded that there was substantial compliance with the State statute requiring service of the information, that an admonition to the jury cured an otherwise error of testimony, that hearsay would be permitted because a new trial would be "an absurdity," that the police officer was doubtlessly chagrined to have lost the knife and there was no reason to believe that the jury did not believe, that the witness had misplaced it. *Stepps* v. *State*, 242 Ark. 587.

A petition for rehearing was promptly filed and was denied immediately without expressing any reason. The mandate of the Arkansas Supreme Court has been stayed pending this application for certiorari.

REASONS FOR GRANTING THE WRIT

1. The Circumstances Evident Concerning the Arrest, Incarceration, and Arraignment of Petitioner.

A. The Arrest.

It should be conceded that petitioner was arrested during the night time by police officers without a warrant. It is provided by Statute [Ark. Stat. Ann. Sec. 43-601 (1964 Repl.)] that where an arrest is effected in this manner, the defendant "shall be forthwith carried before the most convenient magistrate of the County" for determination of the grounds of the arrest and the fixing of a bond.[2]

In this case, the petitioner was placed in jail, and never taken before a magistrate nor permitted to have a preliminary hearing of any sort.

The interpretation of the Chapter governing preliminary hearings by the Arkansas Supreme Court has been liberal to say the very least. In the opinion below, reference was made to *Moore* v. *State*, 229 Ark. 335, 315, S.W. 2d 907, that the statute was directory only and not mandatory. See also *State* v. *Browning*, 206 Ark. 791, 178 S.W. 2d 77; *Mitchell* v. *State*, 230 Ark. 894, 327 S.W. 2d 384.

Here, there is no question but that petitioner specifically made objections to the failure of having a hearing before a magistrate and the improper nature of the arraignment. During the trial, a deputy sheriff testified that he investigated the incident and talked to the petitioner. The deputy sheriff further testified that he

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[2] Ark. Stat. Ann. Sec. 43-605 et seq (1964 Repl.)

obtained a pistol from the petitioner (R.110-113). The defense counsel objected on the basis that the petitioner had not been advised of his constitutional rights to not make a statement, that any statement could be used against him, that he had right to counsel, etc. These objections were overruled (R.115-118). Cf *Clubb* v. *State*, 230 Ark. 688, 326 S.W. 2d 816.

However, this Court has held that the failure to comply with these statutory provisions was a violation of the rights of an accused under the Constitution of the United States. *Payne* v. *State*, 356 U.S. 560 (1958), reversing 226 Ark. 910, 295 S.W. 2d 312. Remarkably enough, that case also originated in the Jefferson Circuit Court.

Viewed in this perspective, it seems apparent that the Supreme Court of Arkansas and the law enforcement officers do not intend to even give lip service to a statute which merely requires that the most fundamental of rights be afforded a person arrested without a warrant. In fact, the interpretation of the Statute by the Arkansas Supreme Court renders it a nullity to the extent that police officers have simply become accustomed to ignoring it. In this respect, the situation is very analogous to admitting illegally obtained evidence. In short, if local police and state courts refuse to give due regard to the basic safeguards due an accused, then it is incumbent upon this Court to intervene and direct a reversal. Only then, where the consequences of their misconduct are so grave will officers reluctantly comply with the statutory and constitutional law of the country. Eg. *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

B. The Arraignment .

It has been noted previously that petitioner was arrested without a warrant and confined in jail without bond. Three days later, the prosecuting attorney filed a felony information alleging that the petitioner had committed the crime of first degree murder. No bond was first permitted by the trial court.[3] The bench warrant was not returned until January 20, some five days after the crime had been committed notwithstanding that it would only have taken a moment for the sheriff or his deputy to walk from the Circuit Clerk's Office to the petitioner's cell.

Arraignment was not accomplished until the morning of the trial, some ten months after the arrest. Furthermore, the arraignment proceedings were conducted in view of the members of the petit jury panel who had gathered pursuant to call for the trial.

C. Service of the Information.

Objection was also voiced by petitioner to the fact that a copy of the felony information was never delivered as required by statute. Ark. Stat. Ann §43-1204 (1964 Repl.). The testimony of the deputy sheriff who made return on the information was that petitioner was orally advised of the filing and that a copy of the information was left with the jailer who had custody of petitioner's personal effects (R.57-58).

The Arkansas Supreme Court ignored a consistent line of decisions which require that a new trial be granted

[3] After the trial, petitioner was permitted to make bail pending his appeal to the Arkansas Supreme Court and has remained on bail awaiting determination of this petition (R.297-299)

where the statute had not been satisfied. *McCoy* v. *State*, 46 Ark. 141 (1885); *Powell* v. *State*, 74 Ark. 355, 85 S.W. 781 (1905). It was reasoned that there had been substantial compliance with the statute and that there was no showing that petitioner was unaware of the charge pending against him. Such a conclusion however does not cure the fact that an accused should be given the benefit of the actual language of the charge pending against him. This is exactly what the statute sought to accomplish.

2. The Petit Jury Panel Should Have Been Quashed for the Systematic Limitation of Members of the Negro Race.

The record in this case establishes that petitioner timely filed two motions to quash the petit jury panel. The first motion challenged the March 1966 Term of petit jurors,[4] and after the case was scheduled for trial for a later term, another motion to quash was submitted.[5] The motion alleged, in essence, that approximately forty-two per cent of the qualified electors in Jefferson County are members of the Negro race and that no Negro had been called for jury service for many years prior to the March 1947 term of the Jefferson Circuit Court. The motion also traced the number of Negroes, varying from one to six, called as jurors for each term of Court from 1947 to the trial date. It was further noted that Arkansas Statutes Annotated §3-227 (1947) requires that the race of the elector be published on the Poll Tax books. The motion finally asserted that there had been a systematic limitation and exclusion of Negroes from jury service in Jefferson County contrary to the Fourteenth Amendment to the Constitution of the United States. In support of

[4] R. 12-21
[5] R. 29-38

the motion, petitioner called the circuit clerk who testified that of the thirty-one members on the trial petit jury panel, only five were Negroes (R.51-52).

The allegations set forth in the motion were not denied nor contradicted by the prosecution. It is submitted that under the circumstances disclosed here, the trial judge should have granted the motion to quash the petit jury panel, and the Arkansas Supreme Court was clearly in error for failing to reverse the conviction.

While it may be conceded that there is a presumption that a jury panel has been properly chosen and the burden of establishing discrimination rests on the accused,[6] the motion to quash incorporated supporting evidence which could not be refuted. Certainly, the history of only token Negro participation on previous panels, which never exceeded the number of peremptory challenges made available by statute to the prosecution,[7] established a prima facie showing of discrimination. Coupling this persuasive proof with the fact that Arkansas Statute by requiring identification of the elector by race furnishes such a device that a discriminatory result is humanly impossible to overcome. *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Avery* v. *Georgia*, 345 U.S. 559 (1953).

The decisions of this Court are clear that once a prima facie question has been raised, the burden shifts to the prosecution and neither the mere presence of Negroes on the panel nor testimony of non-discrimination expressed in general terms is sufficient rebuttal. *Reece* v. *Georgia*, 350 U.S. 85 (1955). In the case at bar, the prosecution chose to remain silent forfeiting its opportunity to show that discrimination did not exist.

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[6] Tarrance v. Florida, 188 U.S. 519 (1903).

[7] Ark. Stat. Ann. §§ 43-1901, 43-1921, 43-1922 (1964 Repl.).

Unfortunately, the State of Arkansas has had a pitiful history of limiting the participation of Negroes for jury service.[8] Even Jefferson County, situs of the petitioner's trial, has experienced prior difficulty with jury discrimination. *Payne* v. *State*, 226 Ark. 910, 295 S.W. 2d 312 (1956), reversed on other grounds, 356 U.S. 560 (1958). Indeed, the motion to quash recited that prior jury panels had in fact been quashed because racial discrimination was determined to have been practiced in the selection of the jury panel.

It is indisputable that except for the March, 1947 and March, 1959 terms, during the past thirty-five terms of the Jefferson Circuit Court, only 124 Negroes had been selected out of 1,573 jurors called for service. Mathematically, this is something less than an average of four Negroes per panel. And rarely, if ever, did Negroes serve as alternate jurors.[9] Thus, the Jefferson Circuit Court juries have had an average of less than thirteen per cent (13%) Negro participation notwithstanding that Negroes comprise approximately 42% of the qualified electors of Jefferson County. While the state prosecutor and the Arkansas Supreme Court may be willing to ignore these compelling facts, petitioner is confident that this Court will not.

3. Certiorai Should Be Granted to Examine the Failure of Police Officers to Safeguard and Produce Material Evidence Exculpatory to the Accused.

The petitioner relied entirely upon a theory of self defense to avoid the charge of murder.

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[8] **Bailey** *v.* **Henslee**, 287 F. 2d 936 (8 Cir. 1961) **cert. den.** 368 U.S. 877 (1961); **Henslee** *v.* **Stewart**, 311 F. 2d 691 (8 Cir. 1963) **cert. den.** 373 U.S. 902 (1963); **Thomas** *v.* **State**, 238 Ark. 201, 379 S.W. 2d 26 (1964).

[9] See allegations of motion to quash R. 29-38

During the trial, the prosecution produced witnesses who observed the incident and offered the petitioner's pistol into evidence through a police officer. All of these witnesses denied seeing the deceased with a knife. On the other hand, the petitioner stated that the reason he had fired the shot was to protect himself from the oncoming assault and injury from the knife held by the deceased. The other officer who investigated the case appeared in behalf of the defense and testified that he had discovered a knife on the floor where the deceased had been shot. He further stated that the weapon had been placed in a sack with the petitioner's revolver and put in a locker he shared with a fellow officer (R.152-154). The other deputy denied ever seeing the knife (R.115-120).

Thus, the weapon of the deceased was a highly disputed aspect of the case. Indeed, the successful defense of petitioner hinged upon the jury believing that the deceased was armed and advancing on the petitioner.

The petitioner had the burden of proving his defense, but the prosecution possessed the essential instrument by which the proof could have been impressed on the jury.

It has been frequently and wisely held that the suppression or withholding of material evidence by the prosecution exculpatory to the accused is a clear violation of due process of law. *Brady* v. *Maryland,* 373 U.S. 83 (1963); *Pyle* v. *Kansas,* 317 U.S. 213 (1942; *Mooney* v. *Holohan,* 294 U.S. 103 (1934). The failure to disclose such evidence is repugnant to due process irrespective of the good or bad faith of the prosecution. *United States ex rel Thompson* v. *Dye,* 221 F. 2d 763 (3 Cir. 1955); *United States* v. *Rutkin,* 212 F. 2d 641 (3 Cir. 1954); *United States ex rel Almeida* v. *Baldi,* 195 F. 2d 815 (3 Cir. 1952), 33 ALR 2d 1407; *Gregory* v. *United States,* 396 F.

2d 185 (D.C. Cir. 1966); *United States* v. *Wilkins*, 326 F. 2d 135 (2 Cir. 1964); *Ellis* v. *United States*, 345 F. 2d 961 (D.C. 1965). And the same is true whether nondisclosure is the result of either negligence or willfulness. *Thomas* v. *United States*, 343 F. 2d 49 (9 Cir. 1965); *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563 (2 Cir. 1961).

The Arkansas Supreme Court avoided these decisions by speculating that:

> "There was no reason to suppose either that the jury disbelieved the officer's uncontradicted statements or that the accused's position would have been strengthened by the actual production of the knife."[10]

The fact of the matter is that several witnesses did dispute the contention that the deceased had a weapon. Moreover, it is just as reasonable to "suppose" that the jury did not believe the former deputy, particularly in view of the result of their deliberation.

No conjecture is necessary however to reach the conclusion that the knife was not produced in evidence. This fact cannot be justified nor can the petitioner's conviction be permitted to stand.

It is submitted that where officers undertake to maintain custody of all of the evidence, the State has the obligation to exercise extreme care to protect it. If the State loses valuable prosecution evidence, then it has nobody to blame except its agents and employees. On the other

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[10] 242 Ark. at 590.

hand, evidence essential to the defense is at the mercy of the adversary who may unwittingly lose or misplace it as in the case at bar. The consequences are simply too great except to adopt a firm rule which will prohibit prosecution unless all evidence favorable to an accused is kept safely available for his use.

The Arkansas Supreme Court clearly erred by refusing to recognize and abide by the pronouncements of this Court governing this issue.

CONCLUSION

It is urged that petitioner has revealed several instances in the record of his trial and in the decision of the Arkansas Supreme Court that are contrary to the decisions of this Court and the concepts of justice. Certiorari should be granted in order that the errors committed in the court below may be fully developed and the petitioner's conviction reversed.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF ARKANSAS
No. 5252

ROBERT STEPPS,
Appellant,

v.

STATE OF ARKANSAS,
Appellee.

Opinion Delivered
May 15, 1967.

Appeal from Jefferson Circuit Court; Henry W. Smith, Judge.

Affirmed.

GEORGE ROSE SMITH, Associate Justice

GEORGE ROSE SMITH, J. On the night of January 15, 1966, the appellant shot and killed Artis Frazer at Hosea Miller's Place, a drive-in roadhouse near Tucker, Arkansas. The prosecuting attorney at first charged Stepps with first-degree murder, but on the day of trial he reduced the charge to the second degree. The jury found the accused guilty of voluntary manslaughter and fixed his punishment at three years imprisonment. The five points urged for reversal have, for the most part, very little to do with the merits of the case.

It is first argued that the information should have been quashed for the reason that Stepps was not served with a copy, as the statute requires in capital cases. Ark. Stat. Ann. §43-1204 (Repl. 1964). Officer Smithey testified that he read the information to Stepps at the county jail and explained that he was leaving a copy with Stepps's personal effects so that it would be available either to him or to his lawyer. Not only was this a substantial compliance with the statute, but there was also no possibility

of prejudice, there being no contention that Stepps was unaware of the charge against him. An allied pre-trial point, that the accused was not taken before a magistrate after his arrest, is without merit; for that statutory requirement is directory, not mandatory. Ark. Stat. Ann. §43-601; *Moore* v. *State*, 229 Ark. 335, 315 S.W. 2d 907 (1958).

The witness Thompson, who was sitting in a car outside Miller's Place when the shooting occurred, testified that after Stepps and another man entered the roadhouse he heard someone say, "Let me kick him before you . . . " Upon objection the court instructed the jury not to consider the statement. The testimony was actually meaningless, for there was no other proof about any threat or act of kicking. The court's admonition to the jury was clearly sufficient to correct the matter. See *Washington* v. *State*, 227 Ark. 255, 297 S.W. 2d 930 (1957).

After the shooting Hosea Miller at once took the injured man to the hospital at England, where Dr. Cooper was called. The defense counsel objected to Dr. Coopers testimony that he examined a man (dead upon arrival at the hospital) "who I later found out was Artis Frazer." The court's action in overruling counsel's objection to the doctor's statement was not reversible error. In a sense, whenever a witness refers to someone by name it could be argued that the reference is based upon hearsay, however long and well the witness may have known the person referred to. But when, as here, there is not the slightest question about the person's identity there can be no sound basis for insisting that the witness not be permitted to refer to him by name. Here the evidence is undisputed that Stepps shot Frazer in the face, that Frazer was taken to the hospital at England, that Dr. Cooper was called, and that Dr. Cooper examined the

body of a man whose death had been caused by a bullet wound in the face. To require a new trial merely because Dr. Cooper was allowed to say that he later found out that the body was that of Artis Frazer would be an absurdity.

Finally, it is argued that the State's suppression of certain evidence amounted to a denial of due process of law. There was a sharp dispute about whether Frazer had a knife in his hand when he was killed. Hosea Miller testified that he did not see a knife immediately after the shooting, but when he got back from the hospital he found a knife on the floor and called it to the attention of Officer Perkins. Perkins testified that he picked up the knife, took it to the county jail, and placed it in a locker that he shared with Officer Bradley. Both officers testified that in some way or other the knife was lost or mislaid before the trial.

This case is unlike those in which the State has deliberately suppressed or inadvertently destroyed evidence essential to the defendant's proof of his innocence. *State* v. *Fowler*, 422 P. 2d 125 (Ariz., 1967); *Trimble* v. *State*, 75 N.M. 183, 402 P. 2d 162 (1965). Here Officer Perkins admitted that he had picked up the knife and that (doubtless to his chagrin) it had been lost. There is no reason to suppose either that the jury disbelieved the officer's uncontradicted statements or that the accused's position would have been strengthened by the actual production of the knife.

Affirmed.